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RELIEF AGAINST FORFEITURE FOR NON-PAYMENT OF RENT WHEN THERE IS A PERIOD OF GRACE.

A difference of opinion exists in our High Court as to the power of the Courts to relieve against forfeiture for non-payment of rent in the case of agricultural leases when the lease allows a period of grace. *Narayana Naicka* v. *Vasudeva Bhatta* [1] *Narayanakamti* v. *Handu Shetty* [2], *Adiraja Shetty* v. *Billa Tyampu* [3], *Mahalakshmi* v. *Lakshmi* [4], *Tungama Shettiti* v. *Korattie Shettiti* [5], and certain other unreported cases take the view that the Court has not got the power while *Appayya Shetty* v. *Mahammad Beary* [6], and certain other cases (S. A. 494/97 ; S. A. 136/103 ; S. A. 2568/12) hold that the Court has power to relieve notwithstanding such period of grace. The two different views indicate two different standpoints as regards the foundation of the Court's jurisdiction. The former set of cases proceed upon the view that the Court has power to relieve only where on the construction of the document it appears that the parties intend the clause of forfeiture to operate merely *in terrorem* while the other set of cases held that apart from any question that the clause was intended to be *in terrorem* or to be enforcible, wherever the clause is as a matter of fact inserted to secure payment of money, the Court has jurisdiction to relieve. There could be little doubt that the English Law as well as the rule enacted in S.114 Transfer of Property Act proceeds upon the latter view. (Story S. 1315). Though in many reported English cases on the subject it will be found that the provision was that the forfeiture was to accrue only on the rent being kept in arrear for a certain period *Wadman* v. *Calcraft* [7] *Sanders* v. *Pope* [8] *Bowser* v. *Cobby* [9] (in fact that is given as the usual form of lease in Woodfall's Landlord and Tenant) at no time was any argument based upon this peculiar clause as excluding the Court's jurisdiction. The case in *Narayana Naicka* v. *Vasudeva Bhatta* [1], recognises the inconsistency of the rule laid down by their Lordships with S. 114 Transfer of Property Act but their Lordships consider

1. (1903) 15 M. L. J. 208.
2. (1901) 15 M. L. J 210.
3. (1910) 20 M. L. J. 944.
4. (1911) 21 M. L. J. 960.
5. (1912) 16 I. C. 803.
6. (1915) 29 M. L. J. 381.
7. (1804) 10 Ves. Jun. 67: 32 E.R. 768.
8. (1806) 12 Ves. Jun. 283: 33 E.R. 108.
9. (1841) 1 Har. 109 : 66 E. R. 959.

that even that section does not exclude a discretion in the court to refuse to relieve when there is a period of grace.

That this view of the English law is right is clear from a consideration of the rule as to mortgages. The principle on which relief is granted against forfeiture for non-payment of rent in the case of leases is the same as that on which redemption is allowed in the case of mortgages notwithstanding a condition that the sale should be absolute in the case of non-payment on the due date. These cases are not pari materia with cases of contracts for the sale of land where though equity regards time as not of the essence of the contract it is open to the parties to make it so. *Stickney* v. *Kuble* [1]. Relief against forfeiture was so much favoured in equity that it could be had at any time however long after eviction till the inconvenience of this was so felt that legislature intervened and reduced the period to six months after eviction. Though it is said that the relief is discretionary, it is hardly ever refused (Redman p. 542) and the only case referred to in text books in which the Court exercised its discretion against the tenant was a case where the landlord had on the faith of the eviction entered into new arrangements with respect to the land which could not be disturbed without great loss to him. *Stanhope* v. *Haworth* [2]. While conceding so far that the English law is distinctly in favour of the view taken in *Appayya Shetty* v. *Mahammad Beari* [3], it must we think be admitted that the other view finds support in the language of the cases which introduced the English doctrine into India. As already stated, the Court's interference in the case of mortgages being on analogous grounds to those in the case of leases, we shall consider the cases on mortgage is first and then cases on leases. Up to 1858, the decisions of the Court of Madras with one exception, enforced the contracts of parties without reference to any principle of equity. In 1858, the current of decision was suddenly turned the Court observing "the established practice in England is to recognise in the mortgagor a right of redemption, notwithstanding that the time stipulated for foreclosure may have passed by' and they do so on the ground that the repayment by the mortgagee of the money lent by him, with interest is an equitable discharge of his claims. The Court of Sudder Adalut recognises the justice of this principle * * the clause of forfeiture in a mortgage deed the Court views as introduced *interrorem* by

1. (1915) A. C. 386. 2. (1886) 3 T. L. R. 34.
3. (1915) 29 M. L. J. 381.

way of a penalty and it is not the practice of the Courts of Equity to enforce penalties. They merely accord to the several parties their just and equitable rights ascertained on consideration of the value that has passed from the one to the other which has to be recovered back." As remarked by their Lordships of the Privy Council in *Thambuswami Mudali* v. *Hussain Rowthen* [1], it will be seen that the Sudder Court did not adopt the English equity principles in their integrity. They treated the stipulation in favour of the mortgagee as a mere penalty and made no provision for his getting the benefit of it by the machinery of a foreclosure suit. The course of decision begun by the Sudder Court was followed by the High Court in *Venkata Reddy* v. *Parvathi Amma* [2], *Nallanna Goundan* v. *Palani Goundan* [3]; *Raja Lakshmi Chelliah* v. *Krishna Bhupati Deva* [4]. In the first of these cases, Chief Justice Scotland recognised the mortgagee's right to a decree for foreclosure which does not seem to have been admitted by the earlier decisions. In the second, the Judges treated the law as settled in almost absolute conformity with that administered by the Court of Chancery. A similar alteration of the law was made in Bombay in 1854. While animadverting upon the course taken by the courts, their Lordships thought it right to say in *Thumbusamy's Case* [1], that "in the case of a security executed since 1858, there would be strong reasons for recognising and giving effect to the Madras authorities with reference to which the parties might be supposed to have contracted." Barring the check received from the Privy Council, the law as to leases had an almost exactly similar growth. In *Cutenho* v. *Souza* [5], the Court held that a forfeiture legally incurred could not be relieved against. But in *Kottal Uppi* v. *Edavalth Thathan Nambudiri* [6], the High Court in second appeal relieved against the forfeiture without referring to the earlier case. The *ratio* of their Lordships' judgment may be gathered from the following extract from the judgment. "In determining whether such a condition (*i. e.*, forfeiture) should be enforced, we think that we should consider whether it was intended by the parties to be a penalty for the purpose of securing the payment of rent. It has been land down in *Peachy* v. *Duke of Somerset* [7], that the true ground of relief against penalties is from

1. (1875) I. L R 1 M. at 19.
2. (1863) 1 M. H. C. R. 460.
3. (1865) 2 M. H C. R 420.
4. (1871) 7 M. H. C. R 6.
5. (1862) 1 M. H. C. R. 15.
6. (1871) 6 M. H. C. R. 258.
7. (1720) 1 Strange 447, 93 E. R. 626.

the original intent of the case where the penalty is designed only to secure money and the Court gives all that was expected or desired. What then was the intention of the parties? It was certainly the intention to create a perpetual tenure. The land appears to have been to some extent waste and it was agreed that the 2nd defendant was to render the said waste land cultivable to hold and to cause to hold and enjoy it permanently (for ever) for himself and his heirs. This being the principal intention of the parties. it could hardly have been anticipated that the 2nd defendant having laid out capital and labour on the property would be content to forfeit his improvements on account of the trifling rent and the intention was that the rent should be regularly paid and the condition of redemption was intended as a penalty to secure such regular payment. To enforce such a penalty would in many cases be productive of hardship." Their Lordships accordingly gave only a decree for arrears of rent with interest at 12 % interest. The old "*in terrorem*" theory again. The Court did not follow the Equity rule and make a conditional decree for possession but wholly disregarded the penalty. Coming next to *Subbaraya v. Krishna* [1], we find Mr. Justice Innes stating and answering the question thus "and the question therefore, remains whether the stipulations are or either of them is, penal and not enforceable." The question is one as to the intention of parties at the time of the execution of the documents to be determined on the construction of the document and on a view of the attendant circumstances. I think looking at the terms of the agreement, to the effect of that the lease was to be forfeited for mere non-payment of rent in any one year together with all rights to improvements that there is very strong reason for saying that if this stipulation stood alone, it could not be held to have been seriously intended that it should be acted upon as it would be recognised to be grossly inequitable that improvements should be forfeited together with the lease. There is not the same ground for saying that the stipulation against alienation was not intended to be enforced but I think it may very well be that the stipulation as to the consequences of non-payment of rent was merely inserted *in terrorem*." On these grounds he refused to enforce forfeiture and gave a decree for arrears of rent. Mr. Justice Kernan while agreeing with the reasons of Innes, J. goes on to say "even if the

1. (1882) I. L. R. 6 M. 159.

rent was in arrears and a forfeiture had accrued the proper decree would have been that the defendant should pay the rent and arrears and costs of suit and in default of such payment within a very limited number of days, possession should be delivered to the plaintiff. This is consistent with *Kottal Uppi* v. *Edavalth Thathan Numbudiri* [1] and is the course in Bombay *Timmappa Puranik* v. *Badya Kuppagoshi* [2]." The Bombay case accepts the Equity practice and refers to Story but the Madras cases, so far, cannot be said to have laid down a general rule that in all cases where there is a clause for forfeiture of non-payment of rent, the Court must relieve. With them, it is a question of construction in each case whether it s a penalty or was intended to enforce and if it is the former, the Court is entitled to relieve against the forfeiture. *Veguran* v. *Ranga Ayyangar* [3] refers to the Madras and Bombay cases and says that such a clause is penal and will be relieved against. 24 M. 269 does not carry the case further except that it is the case of a compromise decree and also seems to indicate that the Court has a discretion to refuse relief if the defendant denied title or deliberately withheld rent. Then we come to the case in *Narayana Kamti* v. *Handu Shetty* [4]. This is what their Lordships say: "In the instrument in the case, there is a peculiar proviso which does not appear in the cases cited. Here there is a covenant to pay rent on the 15th of April. No forfeiture is provided for on account of default in such payment. But it is provided that if the default continue until December, then the lease is to be forfeited. It appears to us that it was clearly not intended that the clause of forfeiture was to be merely *in terrorem*" and this case was followed in *Narayana Naicka* v. *Vasudeva Bhatta* [5], and the other cases *viz*, *Adiraja Shetty* v. *Billa Tyampu* [6], *Kottal Uppi* v. *Edanalath Thathan Nambudri* [7], *Tungama Shettiti* v. *Korathe Shettiti* [8], *Narayana Kamti* v. *Handn Shetty* [4], may be taken to rest the conclusion on the ground that where there is a period of grace, the forfeiture cannot be considered to have been intended merely *in terrorem* and therefore the Court has no power to relieve. It may also perhaps

1. (1871) 6 M. H. C. R. 258.
2. (1866) 2 B. H. C. 63.
3. (1891) I. L. R. 15 M. 125.
4. (1901) 15 M. L. J. 210.
5. (1903) 15 M. L. J. 208.
6. (1910) 20 M. L. J. 944.
7. (1911) 21 M. L. J. 960.
8. (1912) 16 I. C. 803.

be read as resting on the view that the forfeiture in such a case is not for non-payment of rent, but for continued default which being more akin to cases of forfeiture for grounds other than non-payment, the Courts have no power to relieve.

Having regard to the Equity practice of allowing relief even after eviction, delay in payment however long cannot be a ground on which relief can be refused. The ground of the exercise of the equity jurisdiction being as it is, *viz.*, that the penalty is a security for due performance of the covenant, the only grounds that can legitimately be a bar to the award of relief would be ; first circumstances that would make it impossible to sufficiently compensate the landlord ; secondly fraudulent conduct of the defendant which disentitles him to seek relief. In *Sanders* v. *Pope* [1], Lord Erskine declared that the Court had jurisdiction to grant relief in all cases where full compensation could be made, although the breach might have been wilful. This view was disapproved later but that was only in respect of breaches of covenants other than for payment of rent. It is possible to take either the one view which seems to be in accord with the case law in this country or the other which accords with the English law and seems to be more justifiable in theory but the intermediate view taken in *Ramakrishna* v. *Bahmaya* [2], that a period of grace is a matter to be taken into consideration in exercising the discretion against the tenant seems to be in accord with neither the one nor the other.

SUMMARY OF ENGLISH CASES.

Pwallbach Colliery Company *v.* Woodman : (1915) A. C. 634.

Nuisance—Authority to commit—Grant of—Circumstances from which implied—Trade permitted—Result of carrying on in reasonable manner—Nuisance not permitted unless necessary—Easement to spread dust not recognised.

Permission to carry on a trade cannot justify the committal of a nuisance though the nuisance is the result of carrying on the trade in a reasonable manner and in the ordinary way in which such operations are carried on in the locality in the absence of evidence that the trade could not be carried on at all without committing the nuisance.

1. (1806) 12 Ves. 262 s. c. 33 E. R. 108. 2. (1912) 23 M. L. J. 814.

Earl Loreburn: If a nuisance has been committed, no one can excuse it by simply saying "I only did what is usually done in this country and I was not in any way negligent" the character of the locality may be considered when the question is whether or not there has been any nuisance.........Their duty to the neighbour is not merely to take care so as to avoid causing a nuisance. Their duty is to abstain from causing one at all unless they have a right to cause one as for example by statute or consent of the complaining party or of some one whose consent binds him, such consent may be proved like any other question of fact. It may appear from the conduct of the parties and the surrounding circumstances as in *Hall* v. *Lund* [1] or as in *Lyttleton Times Co.* v. *Warners* [2] where both parties agreed that the very thing which was done, should be done though neither of them expected that it would cause a nuisance. Permission to carry on a business is quite a different thing from permission to carry it on in such a manner as to create a nuisance. If it could be proved that the business authorised could not possibly, in a practical sense, be carried on without committing a nuisance, so that everyone must have known the purpose was to commit a nuisance or if some particular method of carrying it on had been authorised, which being faithfully observed had nevertheless necessarily resulted in an unexpected nuisance being committed, then it would have been different.

Lord Atkinson: From the authorities, it is clear that what must be implied is, not a grant of what is convenient or what is usual or what is common in the district or what is simply reasonable but what is necessary for the use and enjoyment in the way contemplated by the parties of the thing or right granted.

Lord Parker: Apart from implied grants of ways of necessity or of what are called continuous and apparent easements the cases in which an easement can be granted by implication, may be classified under two heads. The first is where the implication arises because the right in question is necessary for the enjoyment of some other right expressly granted.

The second class of cases in which easements may be impliedly created depends not upon the terms of the grant itself but upon the circumstances under which the grant was made. The law will readily imply the grant or reservation of such easements

1. (1863) 1 H. and C. 676. 2 (1907) A. C. 476.

as may be necessary to give effect to the common intention of the parties to a grant of real property with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is used. But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant should be intended to be used in a manner which may or may not involve this definite and particular use.

Lord Sumner: A right to coal dust spread anywhere over the lessor's land in any direction and to any distance as the wind may chance to carry it is too indeterminate a right to be an easement.

Sharpness New Docks and Gloucester and Birmingham Navigation Company, (1915) A. C. 654.

Statute—Interpretation—Duty to construct bridge and maintain—Duty to improve or reconstruct—To suit altered conditions —Not implied.

An Act of 1791 empowering a canal company to make a canal by cutting if necessary a highway, required them to construct bridges as required by the commissioners appointed under the Act and from time to time support, maintain and keep them in sufficient repair. The question was whether the canal company was bound to reconstruct the bridge to suit the altered conditions of traffic.

Held, by the House of Lords, that the commissioners were *functi officio* as soon as they certified what was to be constructed and the duty to repair and support was only in respect of such a bridge.

The statutes the language of which has to be construed vary in expression and as they must be read as a whole, the materials for answering questions of interpretation ought primarily to be sought for within the four corners of the Act of Parliament.

Per *Lords Haldane, Parker and Parmoor.* It may be as stated by Lord Moulton in *Hertfordshire County Council* v. *Great Eastern Railway Company* [1], where persons acting under statutory authority interrupt a highway, they must, if nothing to the contrary is enacted, construct such works as will restore to the public its use and maintain these works, unless the statute provides otherwise.

1. (1909) 2 K. B. 403 at 412.

Lord Dunedin :—(*Lord Atkinson concurring,*) Authorisation by statute to do a particular thing makes the thing when done a legal act and imposes no liability. This has often been held, as in a question with private individuals. I see no reason why the principle is not equally sound in the case of a public right and when a statute which authorises goes on to provide what are to be the rights and obligations flowing from the execution of the Statutory Act, it is in it and in it alone the rights and remedies must be found.

Lennard's Carrying Company *v*. Asiatic Petroleum Company, (1915) A. C. 705.

Corporation—Personal defaults of—Meaning of—Managers.

Under the Merchant Shipping Act the owner of a ship is not liable for any loss or damage happening without his actual fault or privity. In this case, the shipowners were a limited company and their managing agents were another limited company. The active director of the latter company was a Mr. Lennard. He was the person who was registered in the ship's register as manager and was also a director of the former. The officials of the two companies were the same and the two companies did very much the same business. The question was whether the default of Mr. Lennard could be considered the default of the ship owners, a corporation. Their Lordships held that his default was to be attributed to the company and the company was liable.

Lord Haldane :—A corporation is an abstraction. It has no mind of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting, that person may be the board of directors itself or it may be and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association and is appointed by the general meeting of the company and can only be removed by the general meeting of the company. If Mr. Lennard was the directing mind of the company his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself. Upon the true construction

of the section the fault must be the fault of somebody for whom the Company is liable not upon the footing of *respondent superior* but somebody for whom the Company is liable because his action is the very action of the Company itself.

Parker *v.* **Ship Black Rock**: (1915) A. C. 725.

Workmen's Compensation Act—Accident in the course of and arising out of employment—Fireman required to provide his own provisions—Accident while getting back from shore after getting provisions—Not in the course of.

A fireman on board a steamship went ashore with leave to buy provisions for himself. On his way back, when getting into the ship, there was an accident and he was drowned. Under the contract of service, the crew had to provide their own provisions. The question was whether the accident could be considered as one arising out of and in the course of employment. Their Lordships held that it could not be so considered. Though the fireman was lawfully employed, he was employed in his own business and not on the business of his master.

The Eastern Trust Company *v.* **McKenzie, Mann and Co., Limited**: (1915) A. C. 750.

Executive Government—Duty of, to abide by law—Injunction—Restraining receipt from Government—Government not restrained—Receipt, contempt nevertheless—Discharge of injunction by failure of suit—Injunction binding.

Where under a contract between the Nova Scotia Government and the Company constructing a railway the Government had authority in case of non-payment of the labourers to pay them out of the moneys payable to the Company.

Held, that the Government's decision on the construction of the contract as to amounts payable on this head was not final.

It is contempt of court for a party who is restrained by an injunction to receive a payment which he is prohibited from receiving and it is nonetheless a contempt because there is or can be on injunction against the party making the payment

An injunction although subsequently discharged because the planitiff's case failed, must be obeyed while it lasts.

The non-existence of any right to bring the Crown into court such as exists in England by petition of right and in many of the colonies by the appointment of an officer to sue and be sued on behalf of the Crown, does not give the Crown immunity from all law or authorise the interference by the Crown with private rights at its own mere will. There is a well established practice in England in certain cases where no petition of right will lie under which the crown can be sued by the Attorney-General and a declaratory order be obtained. It is the duty of the Crown and of every branch of the executive to abide by and obey the law. If there is any difficulty in ascertaining it the courts are open to the Crown to sue and it is the duty of the executive in cases of doubt to ascertain the law in order to obey it, not to disregard it.

Larkin v. Long: (1915) A. C. 814.

Breach of contract—Procuring of—To compel plaintiff to become member of association—Actionable.

In order to compel the plaintiff to become a member of the Stevedore's Association, defendants induced labourers to break their contracts with plaintiffs thereby causing actual money loss to the plaintiff.

Held that the conduct of the defendants was actionable.

Dunlop Pneumatic Tyre Company v. Selfridge and Company, Limited : (1915) A. C. 847.

Contract—Consideration, necessity for—contract in two capacities—Validity of—Stranger to contract—Right of suit.

In consideration of plaintiffs' allowing certain discount, defendant's vendors had agreed not to sell below a certain price except in the case of genuine trade customers, to whom they might allow certain discount from whom, however, as plaintiffs' agents, they had to take an undertaking similar to their own. Defendants gave an undertaking and had the discount but sold the goods at lower rates than warranted by their agreement. In a suit by the plaintiffs for damages, their Lordships held that even assuming that the plaintiffs were undisclosed principals for whom the defendant's vendors really acted in taking the undertaking there was no consideration moving from the plaintiffs for the defendant's undertaking and as such the action failed.

Viscount Haldane: In the law of England, certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaestium tertio* arising by way of contract such a right may be conferred by way of property as, for example, under a trust but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*. A second principle is that if a person with whom a contract not under a seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other persons at the promisor's request. These two principles are not recognised in the same fashion by the jurisprudence of certain continental countries or of Scotland but here they are well established. A third proposition is that a principal not named in the contract may sue upon it if the promisee really contracted as agent. But again, in order to entitle him to sue he must have given consideration either personally or through the promisee, acting as his agent in giving it.

Two contracts, one by a man on his own account as principal and another by the same man as agent may be validly comprised in the same piece of paper. But they must be two contracts and not one. I do not think that a man can treat one and the same contract, as made by him in two capacities. He cannot be regarded as contracting for himself and for another *revo flatio*.

Duncan Rutherford v. William Acton-Adams (1915) A.C. 866.

Specific Performance—Right to compensation—Only in case of deficiency of subject-matter—Not for mis-representation on collateral matter—Remedies.

The right of a purchaser of land to obtain specific performance with compensation is only in cases where there is a deficiency in the subject-matter. It does not apply to a claim based upon a representation on a matter collateral to the contract. The only remedy in such cases is to sue for rescission or for damages for deceit or on the contract if there is one.

The alleged misrepresentation in this case was as to the mileage of fencing on the land. As shortly after repayment of the deposit, the purchaser entered into possession and had taken the profits, rescission was not possible. As no fraud or collateral contract was alleged, plaintiff's claim for damages on that ground also was held inadmissible.

In re **Weightman's Settlement. Astle** *v.* **Wainwright.** (1915) 2 Ch. 205.

Power of appointment—Power to two persons jointly or to the survivor by will—Appointment by both jointly—Reservation of power of revocation by deed to the appointors or survivor—Revocation and re-appointment by deed by survivor—Validity of.

By a power of appointment in a settlement, two persons were empowered to appoint during their joint lives by deed or deeds jointly executed by both of them either with or without power of revocation and re appointment; and it was also provided that in default of any such joint appointment, and so far as such appointment should not extend, the survivor of them may *by his will or codicil* appoint.

The two persons made a joint appointment by deed, with a proviso that it should be lawful for them both during their joint-lives and for the survivor of them during his life by deed or deeds to revoke the appointment wholly or partially. The survivor by deed revoked the appointment and re-appointed in favour of strangers.

Held. The appointors had power in their joint appointment to reserve a power of revocation by deed; and such power was validly exercised by the survivor. The re-appointment not having been made by will, the attempted new appointment was invalid.

In re **Safford's Settlement. Daires** *v.* **Burgers** (1915) 2 Ch. 211.

Power of appointment—Marriage settlement—Power to wife to appoint by will during the continuance of the intended coverture—Will made during coverture—Husband predeceasing wife—Valid execution.

Where in a marriage settlement, a wife was given a power to appoint "by will during the continuance of the intended coverture" such power was validly exercised if during coverture she made a will whereby she appointed the settled funds, though subsequent to the making of the will, the husband died and the wife survived him.

Mallam *v.* **Rose** (1915) 2 Ch. 222.

Easement—Light—Acquisition by prescription—Prescription Act S. 3—Occupier of the servient tenement holding it as tenant of the occupier of the servient tenement—Oral lease.

Where for a portion of the prescriptive period, the servient tenement was in the occupation of a tenant holding under a verbal lease from one who had taken on lease both the dominant and the servient-tenement, the dominant owner is not by reason of the above fact prevented from acquiring the right to light through the windows in the dominant tenement, by prescription under the Prescription Act. Prescription Act S. 3, requires for the prevention of the acquisition of an easement that it should be "enjoyed by some consent or agreement expressly made or given for that purpose, by deed or writing." There having been only a verbal tenancy in this case, the owner of the dominant tenement has acquired a right to light by prescription.

In re **Limend. Limend** *v.* **Cunliff** (1915) 2 Ch. 240.

Will—Soldier's will—Actual military service—Attestation—Bequest to attesting witnesses—Validity of—Wills Act 1837, Ss. 11, 15.

Where upon the conclusion of military operations, a body of troops are left as an escort to the party engaged in the delimitation of the frontier and the testator who belonged to this body of troops was stabbed by the enemy and he dictated his will shortly after, which he signed and which was attested by two attesting witnesses in favour of one of whom he made a bequest.

Held, on a summons,

(1) The will in question was a soldier's will and so does not require the formalities under the Wills Act S. 9. The members of the escort so retained had not finished the expedition on which they had been sent and were still in actual service.

(2) Though the will was attested by two witnesses the will being a soldier's will in actual service, provisions of S. 15 of the Wills Act do not apply to it and the attesting witness takes a valid bequest under the will.

JOTTINGS AND CUTTINGS.

Humor of the Law. General Sabine, Governor of Gibraltar, having failed in his attempts to extort money from a Jew, sent him back by force to Tetuan in Morocco, from whence he had come to Gibraltar. The Jew afterwards went to England and sued the governor for damages.

Mansfield, who had not then received his title, was counsel for the governor. In the course of his defence before the jury he said:

"True, the Jew was banished, but, where? Why, to the place of his nativity! Where is the cruelty, where the hardship, where the injustice of banishing a man to his own country?"

Mr. Nowell, counsel for the Jew, retorted: "Since my learned friend thinks so lightly of the matter, I ask him to suppose the case his own; would *he* like to be banished to *his* native land?

The Court rang with peals of laughter, in which Mansfield himself joined with a good will. *The Central Law Journal, Vol. 81, No. 7.*

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"A young man from the South," says a member of the New York Bar, "who, some years ago, was so fortunate as to be enabled to enter the law offices of a well-known New York firm, was first entrusted with a very simple case. He was asked by the late James C. Carter, then a member of the firm, to give an opinion in writing. When this opinion was submitted, it was observed that, with the touching confidence of the novice, the young man had begun with the expression. 'I am clearly of opinion.'

"Mr. Carter smiled as his eye caught this, and he said:

"'Son, never state that you are clearly of opinion on a law point. The most you can hope to discover is the preponderance of the doubt.'" *Ibid.*

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A famous Chicago lawyer once had a singular cause to settle. A physician came to him in great distress. Two sisters, living in the same house, had babies of equal age, who so resembled each other that their own mothers were unable to distinguish them when they were together. Now it happened that by the carelessness of the nurse the children had become mixed and how were the mothers to make sure that they received back their own infants?

"But, perhaps," said the lawyer, "the children weren't changed at all."

"Oh, but there's no doubt that they were changed," said the physician.

"Are you sure of it?"

"Perfectly."

"Well, if that's the case, why don't you change them back again; I don't see any difficulty in the case."—*Ibid No. 8.*

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"Did the lawyer for the defence submit you to a cross-examination?"

"No indeed: he was just as pleasant about it as he could be."

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Judge William H. McSurely, of the superior Court, told the following at a recent bar association dinner:—

"One day when Judge Gary was trying a case he was much annoyed by a man in the back of the room who kept moving about, shifting chairs, and poking into corners. Finally the judge stopped the hearing and said: 'Young man, you are disturbing the Court by the noise you are making. What excuse have you to offer for your conduct?"

"Why, Judge,' said the young man, 'I've lost my overcoat.'

"That's no excuse,' retorted the judge. 'People often lose whole suits in here without making half the disturbance.'"—*Ibid No. 10.*

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The Laws sat about the long green table. All the fundamentals were there save one. Even the decrepit Salic Law was present, dozing between the Mosaic Laws and the Law of Primogeniture. . . .

The chairman of the Law of the Land called the meeting to order.

"Are we all present?" he asked.

It was the Blue Laws who responded.

"I don't see nothin' of the Law o' Nations," he squeaked.

"The Law of Nations has been abolished," the chairman sharply replied. "The business of the convention will now proceed."—*Ibid No. 11.*

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Internment and the Royal Prerogative. A bold extension of the Royal Prerogative was claimed on behalf of the Crown by its responsible legal adviser in the case of *Rex* v. *Superintendent of Vine Street Police Station,* in which a considered judgment was delivered by a Divisional Court (Bailhache and Low, JJ.) last Monday. The Solicitor-General stated that he was prepared to argue for the existence of an inherent power vested in the Crown, during time of war, to arrest and detain without trial

during the continuance of the war any person it pleased, whether British subject, alien friend, or alien enemy. The legal grounds for this claim were not argued, since the Court in fact decided on a preliminary objection that the subject of the proceedings was an alien enemy, and, though a civilian, a prisoner of war; so that in accordance with settled principle, fully supported by precedents, he was not entitled to avail himself of the remedy of *Habeas Corpus*. But while the wider point was neither fully argued nor expressly pronounced upon by the Divisional Court which heard the application for a writ of *Habeas Corpus* in the Liebmann case, both judges made it clear that the proposition put forward by the Solicitor-General did not commend itself to the Court. The suggested right, indeed falls not one whit short of the 'suspending power' claimed by the last Stuart monarch and expressly declared illegal by the Bill of Rights; it would assert for the Crown an inherent right to suspend the *Habeas Corpus* Act of 1679 at its arbitrary discretion in time of war, This is a vast extension of the pernicious doctrine laid down in the celebrated case of *In re Marais* (1902), where the Privy Council—overruling old authorities and deciding contrary to the general sense of constitutional lawyers—held by a majority (as is generally understood) that while war is actually raging in any district the decision of a court-martial cannot be questioned by the civilian courts sitting in that district. But even this doubtful doctrine only applies where military operations are actually being carried on in the area where martial law has been proclaimed. and it applies only to the judicial acts of courts-martial, not to the arbitrary acts of the Executive Government. So long as England remains uninvaded by foreign troops—for Zeppelin raids are hardly a warlike invasion—the proclamation of martial law, except so far as permissible under the Defence of the Realm Act or other emergency statutes, is clearly unconstitutional, and precedents based on a state of affairs which does not at present exist are of no constitutional value. The refusal of *Habeas Corpus* to British subjects arbitrarily interned by Act of State would simply be to reduce such subjects to the status of alien enemies. It would destroy at one blow all the sacred meaning residing in the proudest boast of every Briton; *Civis Britannicus sum*.' *Law Journal.*

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Miscellany.—Reuter's correspondent, writing from Amsterdam (September 4), says that, according to the *Deutsche Juristen-zeitung*, 1,964 German lawyers had been killed up to August 26, among them being 10 professors of law, 414 high administrative officials and judges, 1,176 minor judges, and 365 solicitors. *Law Journal.*

Economy and the Law.—The general desire for economy in public departments is providing some strange comments on the expenditure on the administration of the law. A reference in a popular weekly journal to Lord Haldane's position will serve to indicate how misleading some of these criticisms are :—

Some weeks ago Lord Haldane was retired fromt the Lord Chancellorship. His salary was 10,000*l.* a year. On retirement he was promptly given the usual pension of 5,000*l.* a year. Now, the of the Lord Chancellor may be worth 10,000*l.* a year—few of us are competent to express an opinion on the point, though we may have our doubts—but certainly no man is worth a pension of 5,000*l.* after a few years' work. There is room for economy if you like !

Not a single word is written in *Reynolds'* to lead its readers to understand that Lord Haldane, like every ex-Lord Chancellor, renders most valuable judicial service for the 5,000*l.* a year he receives by way of pension. He takes a frequent and leading part in the judicial work of the House of Lords and the Privy Council, sitting, indeed, as regularly as any Lord of Appeal in Ordinary, whose salary is 6,000*l.* a year If the two supreme appellate Courts were without the services of the ex-Lord Chancellers, the number of their ordinary members would have to be increased, and the public purse would suffer rather than gain by the process. It is suggested that other judicial pensions afford a fitting scope for economy. Are we to understand that Parliament is to be invited to withhold or diminish the retiring allowances of the judges who, after serving the qualifying period of fifteen years, are now in the enjoyment of them ! A pension is merely a deferred payment of salary, and any interference with the judicial pensions now payable by the Treasury would be as gross a breach of faith as could well be imagined, while any arrangement by which the retiring allowances of future judges were decreased would inevitably impose upon Parliament the necessity of increasing their salaries. *Law Journal September 18.*

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Miscellany.—If the rumour that Mr. H. E. Duke, K. C. N.P., is to be appointed a Lord Justice should prove to be well founded, his promotion to the Court of Appeal direct from the Bar

(says the *Globe*) will be a rare but not an unprecedented event. Lord Justice Mellish Lord Justice Cotton, Lord Justice Thesiger, and Lord Justice Moulton were raised to the Appeal Court straight from the ranks of practitioners, and exceptionally good appointments they all proved to be. A still greater distinction belonged to Lord Macnaghten, who rose at one bound from the position of a Chancery K. C. to that of a Lord of Appeal in Ordinary. It is, of course, not an uncommon thing for an ex-Law Officer to reach these great judicial heights direct from the Bar, but it is a very unusual thing for an ex-official leader of the Bar to do so. All the existing members of the Court of Appeal have had their time of service in the courts of first instance, Sir Herbert Cozens-Hardy, Lord Justice Swinfen Eady, and Lord Justice Warrington in the Chancery Courts, and Lord Justice Phillimore, Lord Justice Pickford, and Lord Justice Bankes on the Common Law side.

In the House of Lords there are a considerable number of judges who have no judicial experience of the Courts whose judgments they review. The three ex-Lord Chancellors—Lord Halsbury, Lord Loreburn, and Lord Haldane—had no acquaintance with judicial life before they occupied the Woolsack, and the present Lord Chancellor resembles them in that respect. Nor had Lord Atkinson or Lord Shaw; the former was Attorney-General for Ireland when he was made a Lord of Appeal in Ordinary, while the latter was Lord Advocate. Lord Moulton, Lord Parker, Lord Dunedin, and Lord Sumner are the only ordinary members of the Supreme Court who have sat in the Courts below, and one of them—Lord Parker—leapt from a puisne judgeship to a Lordship of Appeal. Of the three Law Lords who take part pretty regularly in the judicial work of the House of Lords without being paid for their services, Lord Mersey and Lord Wrenbury are ex-judges of the High Court, while Lord Parmoor did not begin to sit as a judge until he was made a peer. *Ibid.*

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Trials 'in Camera'.—Among lawyers who take an enlightened interest in the principles of criminal jurisprudence much uneasiness is felt at the growing tendency of prosecutors and magistrates to hear in private summonses under the Defence of the Realm Act. Of course, in some cases these summonses relate to the procuring of information likely to prove useful to the enemy, and in such cases trial *in camera* is both necessary and

proper. But in a very large number of cases the charge is of a different kind. The defendant is accused of publishing statements calculated to prejudice recruiting or cause disaffection, and generally it turns out that the 'statements' which form the subject of the charge are simply the expression of extreme and misguided opinions on the merits of the war or the diplomacy of Sir Edward Grey. It is not easy to justify on grounds of 'public safety' the refusal of a trial in open court to persons accused of such offences, and the hearing of such cases *in camera* is in many cases nothing more nor less than an abuse of the powers conferred on the Court by section 3 (1) of the Defence of the Realm Act. Magistrates make every attempt to do their duties conscientiously but after all they are only fallible human beings, liable like others to have prejudices and preconceived opinions. The great safeguard against the danger of any magistrate being unduly influenced by his private opinion is the necessity he ordinarily lies under of hearing a case in public, where any mistakes he may make can be noticed and commented upon. Responsibility to enlightened public opinion is the best preservative of judicial good sense and impartiality. Remove this responsibility and abuses creep in. That is why our Common Law insists on open trial and only permits a private hearing where otherwise justice would be defeated. 'To justify an order for hearing *in camera*,' said Lord Haldane in the celebrated *Scott case* (1913), 'it must be shown that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made.' *Mutatis mutandis*: this Common Law Principle should guide justices as to the exercise of their statutory discretion under the Defence of the Realm Act. Trials *in camera* should only be ordered when the 'paramount object'—in this case, that of preserving the safety of the public—would really be 'rendered doubtful of attainment' if the hearing were open. The mere desire to deprive unwise individuals of a gratis advertisement of their views is not a sufficient reason for overriding the liberty of the subject. Lord Parmoor has behind him all the best legal opinion in his courageous support of this view in the House of Lords, where the constitutional rights of the lieges seem now to find their chief bulwark and protection. *Law Journal October 3 1915.*

CONTEMPORARY LEGAL LITERATURE.

In the "Law Quarterly Review" for July, there is a very learned article on Market Overt in the City of London, its antiquity, how far sale in market overt makes up for defective titles, to what extent the customs relating there to are Mercantile customs, how far local, and the extent to which these customs have survived the shock of modern times, whether a modern shop is an open shop within the meaning of the custom and many other interesting questions.

Mr. Courtney Kinney criticises the unwarranted introduction of criminal *purpose* as an element in the crime of treason, in the recent case of *King* v. *Ahlers* 1.

Mr. Paley Baildon hails the declaration of the Committee of Peerages in the St. John Peerage case that they would hereafter act on historical records and not on the *apriori* theories of lawyers and Judges.

Another article by Mr. Adolphus Ballard contains much learning on Township moots, what the terms Vill, Manor, parish and townships meant, their constitution &c.

Speaking of the administration of justice in America, a writer in the Central Law Journal (p. 13 says). "It is a good game but we ought not to make the mistake of calling it a system for the administration of justice. It administers justice no more than it administers injustice." "Shall we permit our legal procedure to continue, the great game which it is—a game under the control of private parties or shall we make the administration of justice one of the great duties of the State and the receipt of justice one of the great rights of the people."

Professor Lee writing in the Canadian Law Times of August says that "the better view would be to think of Government or of sovereignty not as the attribute of a specific person or body of persons—but rather as the animating force which diffused through the state is the source of its activity." "Sovereignty is" he says "the sum total, perhaps more correctly the combined result, of individual forces."

An article in the Law Magazine and Review dealing with reprisals in warfare says on the question of their legality (1) they have been recognised through all ages as a means of securing legitimate warfare (2) they ought not to exceed in severity the evil sought to be redressed (3) while it is eminently desirable

1. (1915) 1 K. B. 616.

that the persons to suffer from reprisals should be the actual wrong doers yet this is not a *sine qua non* and innocent persons may be made the victims. The writer is of opinion that if in the course of reprisals, neutral countries are injured, they are entitled to receive compensation for the loss sustained.

Chicago Legal News of July 17 gives an account of the German and French moratorium laws.

BOOK REVIEW.

SANJIVA RAO'S *All-India Civil Court Manual. Imperial Acts Vol. I. (Third Edition). Law Printing House, Mount Road.*

It was only five years ago that the first edition of this publication was brought out. The rapidity with which the two editions have run out shows the need felt by the legal profession for such a publication and the remarkable way in which the publishers have satisfied the need. Besides incorporating in the volume the Acts passed up to June 1915, the publishers have prefixed to the volume, a list of contents of each Act, which will be of great use to the practitioner. It is also worthy of note that the Government of India Act (5 & 6 Geo. V. Ch. 61) which was passed so lately as the 29th July 1915 finds a place at the end of the volume, on account of its supreme importance.

A SUPPLEMENT TO INDIAN CONSTITUTIONAL DOCUMENTS, *by Panchanandas Mukherji, M. A., Calcutta Tharker Spink & Co., 1915.*

As the Government of India Act, 1915 came too late for inclusion in the original volume, it is published as a supplementary volume. This statute brings up to date the record of constitutional land marks along which the Indian constitution has developed since the acquisition by the East India Company of the Dewani of Bengal in 1765. It is not too much to say that no student of the Constitutional History of India should fail to be in possession of this volume and the original volume to which this is a supplement.

DIGEST OF CASES ON MORTGAGE AND CHARGE, *by Bakshish Lal, Pleader—Rajniti Press, Patna, 1915.*

This is a digest of all the Indian cases reported hitherto on the subject of mortgages and charges to be issued in monthly parts. It is hoped that special attention paid to one branch of the law will serve to make the digest complete.